

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONIE LAKEITH MONK,

Defendant-Appellant.

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UNPUBLISHED

September 11, 1998

No. 193132

Recorder's Court

LC No. 92-011387

Before: Saad, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant was originally convicted of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and was sentenced to lifetime probation in 1992. In 1995, he pleaded guilty to violating the terms of his probation and was sentenced to a term of ten to twenty years' imprisonment. The judgment of sentence was later amended to require that defendant serve his sentence consecutive to other sentences that he was already serving. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion to withdraw his guilty plea because the authorities did not act with due diligence in executing the arrest warrant charging him with violating his probation.

When a warrant for a probation violation is issued, the authorities must exercise due diligence in executing it. If the authorities do not exercise due diligence, then the probation violation is waived. *People v Ortman*, 209 Mich App 251, 254; 530 NW2d 161 (1995). This rule is a type of speedy trial rule for persons charged with violating probation. *People v Hanson*, 178 Mich App 507, 509-510; 444 NW2d 175 (1989). However, such speedy trial claims are no longer considered "jurisdictional defects" within the meaning of *People v New*, 427 Mich 482; 398 NW2d 358 (1986). Thus, a claim of this type is waived by an unconditional guilty plea. *People v Bordash*, 208 Mich App 1, 2-4; 527 NW2d 17 (1994). Therefore, because defendant entered an unconditional guilty plea to violating his probation, he has waived any claim of error associated with the delay in executing the probation violation warrant.

Next, defendant argues that he should have been permitted to withdraw his guilty plea because the trial court did not comply with the requirements of MCR 6.445 when it accepted his plea. When a defendant moves to withdraw his guilty plea after sentencing, the decision whether to grant the motion is left to the trial court's sound discretion and this Court will not disturb that decision unless there is a clear abuse of discretion resulting in a miscarriage of justice. *People v Ovalle*, 222 Mich App 463, 465; 564 NW2d 147 (1997).

Under MCR 6.445(F)(1), the trial court was required to advise defendant of his right to a contested hearing before accepting the plea. The record indicates that the trial court explained to defendant on the record that he had a right to a hearing regarding whether he violated his probation, thus complying with MCR 6.445(F)(1). Therefore, the trial court did not abuse its discretion in refusing to allow defendant to withdraw his plea on this ground. *Ovalle, supra*.

MCR 6.445(F)(4) also required the trial court to establish factual support for a finding that defendant violated his probation before accepting a plea. The record indicates that the trial court announced the allegations against defendant on the record and defendant confirmed for the court that the allegations were true. On this record, the trial court adequately complied with MCR 6.445(F)(4). Compare *People v Laurent*, 171 Mich App 503, 506-507; 431 NW2d 202 (1988); *People v Alame*, 129 Mich App 686, 690; 341 NW2d 870 (1983). Thus, the trial court did not abuse its discretion in denying defendant's motion to withdraw his plea on this basis as well. *Ovalle, supra*.

Defendant next alleges error with the trial court's decision to amend the order of probation to add a requirement that he spend 120 days in a boot camp aftercare facility in addition to the ninety days he was ordered to serve in boot camp. The order of probation was first entered on December 2, 1992, and the trial court amended its order on December 22, 1992. Defendant did not raise this issue until after he pleaded guilty to violating his probation and was sentenced for the probation violation. Because the amendment of the probation order relates to defendant's original sentence of probation, he should have challenged the amendment at that time. This appeal from defendant's probation violation is limited to those matters relating to the probation violation, not the conditions imposed by the court's order of probation. *People v Nesbitt*, 86 Mich App 128, 133; 272 NW2d 210 (1978). However, in light of the importance of this issue, we will proceed to address it.

Although the record does not indicate what procedures the trial court followed before amending the original order of probation, we will assume that the trial court did not provide defendant with notice or conduct a hearing before amending the terms of probation.

A trial court retains the discretion to amend an order of probation at any time without notice to the defendant or without an opportunity for the defendant to be heard. MCL 771.2(2); MSA 28.1132(2); *People v Britt*, 202 Mich App 714, 716; 509 NW2d 914 (1993). By statute, the trial court had the statutory authority to require defendant to spend up to 120 days in an aftercare facility as part of his probation. MCL 771.3a(1); MSA 28.1133(1)(1), MCL 771.3b(1), (9); MSA 28.1133(2)(1), (9). Thus, defendant was on notice that this could be a condition of his probation. *People v Graber*, 128 Mich App 185, 191; 339 NW2d 866 (1983). Defendant contends, however, that the ex parte amendment violated his right to due process.

In *People v Jackson*, 168 Mich App 280, 283-284; 424 NW2d 38 (1988), this Court held that it is a violation of the Due Process Clause of Const 1963, art 1, § 17, for a court to ex parte amend an order of probation where the effect of the amendment is to require the defendant to be confined, when he formerly was free of any type of confinement or incarceration. In such a circumstance, the decision involves a fundamental change in the defendant's liberty interest. *Id.* at 283. Therefore, due process considerations require that the court provide notice to the defendant and conduct a hearing before amending a probation order in this manner. *Id.* at 283-285. The facts in *Jackson* involved a defendant's voluntary attendance at a rehabilitation center while on probation, which was subsequently changed to a mandatory term by the trial court without prior notice to the defendant. *Id.* at 281-282.

In this case, however, the trial court's amendment did not involve a fundamental change in defendant's liberty status. Under the court's original order of probation, defendant was required to serve time in the county jail until space became available at a boot camp, where defendant was required to stay for ninety days. Although the court increased the amount of time that defendant was required to spend confined (up to an additional 120 days), because the court originally ordered defendant confined as a term of probation and because defendant was already confined at the time the trial court amended its order, the court's amendment did not constitute a fundamental change in defendant's liberty interest such as was at issue in *Jackson, supra*. Given the broad discretion granted to the trial court to amend an order of probation, defendant did not have any expectation that a hearing would be held or notice provided before any term of his probation was amended. See *People v Kendall*, 142 Mich App 576, 578-579; 370 NW2d 631 (1985). Accordingly, the amendment did not violate defendant's due process rights and, therefore, defendant could properly be charged with violating his probation for failing to comply with this new condition.

Next, defendant claims that trial counsel was ineffective for not moving to quash the probation violation warrant on the basis of the delay in executing the warrant. He also argues that his counsel was ineffective at sentencing.

Defendant's first argument is waived as a result of his unconditional guilty plea. As discussed previously, a claim alleging that a warrant for a probation violation was not issued with due diligence is waived by an unconditional guilty plea. As a result, a claim of ineffective assistance of counsel based on counsel's failure to raise that issue is also waived. *Bordash, supra*, at 2-4; *People v Vonins (After Remand)*, 203 Mich App 173, 176; 511 NW2d 706 (1993).

Defendant's second argument of ineffective assistance of counsel, although not waived, is not supported by the record. In order to establish ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by the representation. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

The sentencing transcript indicates that counsel was aware that the sentencing guidelines did not apply to defendant when he was being sentenced for violating his probation, but, at best,

served only as a starting point. *People v Cotton*, 209 Mich App 82, 83-84; 530 NW2d 495 (1995). Counsel referred to the guidelines on the record and asked the court to sentence at the "very low end." Defendant has not shown that counsel was ineffective at sentencing.

Next, defendant argues that the trial court erred as a matter of law when it ordered his sentence to be served consecutively to sentences he received for crimes committed while still on probation, but after he left the aftercare facility. The trial court agreed with the prosecution that consecutive sentencing was authorized by MCL 768.7a(1); MSA 28.1030(1)(1), because defendant had escaped from a correctional facility when he committed the later crimes.

MCL 768.7a(1); MSA 28.1030(1)(1) requires that when a person incarcerated in a penal or reformatory institution in this state escapes from such an institution and commits another crime, consecutive sentencing is required. This statute is to be liberally construed in order to achieve the deterrent effect intended by the Legislature. *People v Dukes*, 198 Mich App 569, 570; 499 NW2d 389 (1993). The purpose of the statute is to deter those previously convicted of crimes from committing other crimes by removing the security of concurrent sentencing. *People v Weatherford*, 193 Mich App 115, 118; 483 NW2d 924 (1992).

The above statute has been applied to almost every conceivable type of incarceration. The statute is broadly construed to include any "grounds under [the] control of any person authorized by the Department of Corrections to have a prison inmate under care, custody or supervision either in an institution or outside an institution, whether for the purpose of work, medical care, or any other reason." *People v Lakin*, 118 Mich App 471, 474; 325 NW2d 460 (1982).

Given the broad language of the above statute and its intended purpose, we conclude that consecutive sentencing was appropriate when defendant left the boot camp aftercare facility without permission. The trial court did not err in ordering consecutive sentencing.

Finally, defendant challenges his sentence of ten to twenty years' imprisonment as disproportionate. This Court reviews sentencing decisions for an abuse of discretion by applying the principle of proportionality and determining if the sentence imposed is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Because defendant was sentenced for violating his probation, the sentencing guidelines were not applicable. *Cotton, supra* at 83-84.

Defendant's inability to reform and the serious nature of the crimes committed by defendant while on probation support the trial court's sentencing decision. Defendant has not shown that his sentence is disproportionate.

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

